hand, the statements were made not with a view to avoid the bar of section 162 of section 169, or by way of colourable pretence, but by way of greater caution the statements are admissible."

Section 163 of the Indian Criminal Procedure Code is similar to section 113 of our Criminal Procedure Code. The authority quoted for that proposition in *Sohoni* is the case of *Shiv Bahadur Singh* v. *State of Punjab.*[5] Having read that very long report I came to the conclusion that the facts disclosed of what took place in that case were much closer to a "colourable pretence" than the facts of what took place in the present case. I came to the conclusion therefore that the tape recording was a statement made to a person assisting the police but that it was not made with a view to avoid the bar of section 113 of the Criminal Procedure Code. As a consequence I held that the tape recording of what P.W.1 and P.W.8 said to one another was admissible. What the Chinese who came to the shop said to P.W.1 however would not be admissible because that Chinese was not called as a witness and it would therefore be hearsay.

The next question was whether when P.W.17 was interrogating him the respondent submitted to custody by word or by action. The principle is that where a person states that he has done certain acts which amount to an offence he accuses himself of committing the offence. It was submitted on behalf of the respondent that the admission by the respondent that he had accepted some fish and two motor tyres constituted an admission of the commission of the offence with the result that he was to be deemed to have submitted to custody for the purposes of section 15(i) of the Criminal Procedure Code and that he was therefore technically under arrest. As the acceptance of fish or motor tyres is not by itself an offence an admission that one has done so cannot by itself amount to an admission which would amount to a submission to custody. That being so the learned President had stopped the evidence of what transpired between P.W.17 and the respondent at too early a stage. It may well be that the very next words spoken by the respondent were such as to render anything said further inadmissible but on the other hand it may be that the whole of the conversation was admissible. It is impossible to say. All that can be said is that there was no evidence that, at the time a stop was put to P.W.17 giving this evidence, it was the right time to do it.

However I do not think that section 15(1) of the Prevention of Corruption Act, 1961, has the meaning which the learned Deputy Public Prosecutor gave it. I think that the words "notwithstanding anything to the contrary" must have reference *inter alia* to section 26 of the Evidence Ordinance and that the effect of section 15(1) of the Act is that, where the statement is made after the person making it has been arrested, section 26 of the Evidence Ordinance does not apply but proviso (b) to section 15(1) of the Act does. Accordingly evidence can only be given of what the statement was, if it was made after the person making it had been arrested, if he had been previously cautioned.

As I indicated during the course of the argument in my opinion the burden of proof under section 14 of the Prevention of Corruption Act, 1961, is the *Carr-Briant* [6] burden of proof and not the *Saminathan* [7] burden of proof. That is to say the burden on an accused person under section 14 of the Prevention of Corruption Act, 1961, is no higher than that on a party to a civil action to prove his case on the balance of probabilities.

It will be seen from what I have said that the learned President appeared to have failed to give due weight to some of the evidence adduced by the prosecution. However I thought the main point was that had the learned President:—

(i) considered Hashim (P.W.8) to be unworthy of credit and

(ii) admitted the evidence of the conversation between P.W.1 and P.W.8 as recorded on the tape recorder and

(iii) admitted all the admissible evidence of what took place between the respondent and P.W.17 when the trap was sprung,

all of which in my opinion he should have done, it might well have been that the learned President would have come to a different decision. I was unable to say because, although in my opinion P.W.8 was a person wholly unworthy of credit, I did not know what the tape recording would disclose and I did not know what, if any, further admissible evidence of the conversation between the respondent and P.W.17 would disclose. It was not therefore a case in which I could substitute a conviction in place of the acquittal as I had been urged to do by the learned Deputy Public Prosecutor.

Accordingly I allowed the appeal and ordered a retrial.

Appeal allowed.

CHONG KEE SENG v. CHE CHIK

[F.C. (Barakbah C.J. (Malaya), Azmi & Suffian JJ.) January 30, 1964]

[Kuala Trengganu — Federal Court Civil Appeal No. 3 of 1963]

Practice and Procedure—Judge deciding on issues not raised in pleadings—Judge himself raising question of illegality of contract—New trial ordered—Surprise—O. 19 r. 15.

The respondent, a Malay, claimed possession of a piece of land of which she was the registered owner. The appellant, a Chinese, alleged that the land had been sold

to him and produced an agreement dated August 20, 1949 in support thereof. The respondent admitted putting her thumb-print to the agreement but denied that the two witnesses were present when this was done. She also alleged that she did not know the nature of the document. In the course of her evidence the respondent also stated that the land was in a Malay reservation area. The learned trial Judge raised the question of illegality but held that the land being in a Malay reservation area was a Malay holding and could not therefore be transferred to the appellant. On appeal,

Held: the question raised by the trial Judge himself as to illegality had taken the opposite party by surprise and had raised issues of fact not in the pleadings. Judgment of the trial Judge set aside and a new trial ordered.

FEDERAL COURT.

Maidin bin Mohamed Ibrahim for the appellant.

Wan Mustapha bin Haji Ali for the respondent.

Azmi J. (read by **Barakbah C.J. (Malaya)**): This is an appeal against the order of the learned Judge at Kuala Trengganu ordering the appellant to give vacant possession of a piece of land in the Mukim of Sungei Buaya, Dungun, Trengganu.

The respondent, who was the plaintiff in the Court below, in her statement of claim alleged that she was the registered owner of the land held under Title No. 1101, Lot No. 1655, and that the appellant had built two houses on the said land. The statement of claim goes on to say that she had given notice to the appellant to vacate the land, which the appellant failed to do. She, therefore, claimed for possession of the land occupied by the appellant.

The defence was that the appellant had purchased a portion of the land on which he had now built his two houses and, in support, produced an agreement, Exhibit D.1.

According to the agreement purported to have been thumb-printed by the respondent and witnessed by two persons, the respondent sold "an area of 60′ x 100′ by the side of the road to Chong Kee Seng of Kampong Sungei Buaya, Dungun for $280.00 (dollars two hundred and eighty only) for house site."

When the agreement was made on the 20th August, 1949, the land was referred to as K.S. 436. The respondent at the trial alleged that though she put her thumb print on the document she was not aware that it was a document of sale. She understood it to be merely a receipt for $250 which she had in fact received from the appellant. According to her she merely gave permission to occupy that portion of the land. She admitted that she put her thumb print on Exhibit D.1. She denied, however, that two witnesses were present when she put her thumb impression on the document.

The appellant in his evidence stated that he bought the portion of the land and that the respondent put her thumb print on the document D.1.

Ismail bin Ibrahim, now station master at Bukit Besi, said that he was the man who wrote the document. He read the document to the respondent and she agreed with it. This witness, however, said that the two witnesses to the document did not sign it in his presence. He, however, maintained that he read out the document to the respondent.

In the course of her evidence the respondent said the land was in the Malay Reservation area. The learned Judge held that the land being in the Malay Reservation area was a Malay holding and cannot, therefore, be transferred to the appellant who was a Chinese. and for that reason he ordered that the appellant give up vacant possession of the land.

The learned Judge in his judgment did not deal with the question of fraud which was raised by the respondent in her evidence, nor was the question argued. In any case fraud was not pleaded by the respondent, which she should have done in her reply to the defence. The grounds of appeal were, among others, as follows:

"3. The learned trial judge was wrong in law in proceeding with the trial on the pleading which was bad in law.

4. The learned trial judge erred in law in going entirely outside the pleadings and attempting to find evidence for the plaintiff by going to the Land Office, Dungun. The plaintiff had at no time suggested that the land in question was a Malay Reservation and no such issue arose on the pleadings."

Para. 5 of the memorandum of appeal alleges that at the time when the agreement — Exhibit D.1 was made the land in question was not a Malay Reservation.

It would appear that, according to the pleadings, the respondent's claim was for possession of land and the defence was that there was a contract of sale executed in 1949. In the course of the trial, however, fraud was alleged by the respondent as to the contract of sale and the trial Judge himself raised the question of illegality. In my view the allegation of fraud should have been pleaded by the respondent in reply to the allegation that there was a contract and the burden is on the respondent to show fraud beyond reasonable doubt.

As to the question of Malay Reservation, there again the question was not pleaded nor argued and no opportunity was given by the trial Judge to the defendant to show that at the time of the execution of the agreement the land was not a Malay Reservation within the meaning of the Malay Reservation Enactment.

Order 19 rule 15 says:

"The defendant or plaintiff (as the case may be) must raise by his pleading all matters which show the action or counter-claim not to be maintainable, or that

the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, limitation, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds."

This rule is marked with an asterisk and, according to the notes given in the preamble to our Rules of the Supreme Court, 1957, an asterisk indicates that it differs from the English rule similarly numbered.

In my view there is no doubt that the question of illegality had taken the opposite party by surprise and also that in this particular case that question had raised issues of fact not arising out of the preceding pleadings.

In view of the above I would consider that the proper course this Court should take would be to set aside the judgment of the trial Judge and order a new trial with liberty to the parties to file fresh pleadings. The costs of the appeal and the costs of the first trial should follow the event of the second trial.

Barakbah C.J. (Malaya) concurred.

Suffian J.: I am not happy about this appeal but having considered it with care, I respectfully agree that there should be a new trial with liberty to the parties to file fresh pleadings. I accordingly concur with the judgment of brother Azmi.

New trial ordered.

Solicitors: *Wan Mustapha & Co.*

DARUS v. PUBLIC PROSECUTOR

[A.Cr.J. (Ong J.) January 31, 1964]
[Ipoh — Criminal Appeal No. 103 of 1963]

Road Traffic—Private motor-car used as public service vehicle—When presumption may be used to establish the offence charged—Presumption of fact or law—Meaning of "in so far as it may be necessary" and "groundwork"—Road Traffic Ordinance, 1958, ss. 22(2), 74(1), 92(1) and 144.

The appellant was charged under sections 92(1), 22(2) and 74(1) of the Road Traffic Ordinance for using his motor car as a public service vehicle, for using the said car for a purpose for which the licence fee chargeable was higher and for using the said car without there being in force in relation to such user a policy of insurance in respect of 3rd party risks. At the trial uncontroverted evidence as to user of the vehicle was given by a police constable who stated that he observed the motor car for 14 days during which period the car was seen carrying 140 passengers on 47 occasions. The three passengers travelling in the car on the occasion for which the appellant was charged were also called as prosecution witnesses. These witnesses however contrary to their previous statements to the police denied that they paid or intended to pay the appellant for being carried in his car. On this evidence the learned Magistrate convicted the appellant on all three charges. It was argued on appeal, *inter alia*, that the verdict of the learned Magistrate was unreasonable having regard to the evidence and that the Magistrate misdirected himself in holding that there was adequate evidence to raise the presumption under section 144 of the Ordinance.

Held: as it was not shown that the decision of the Magistrate was wrong in law or against the weight of evidence the decision of the learned Magistrate should be upheld.

Per Curiam: "I declared in *Gan Chye Huat* (2) what I believed to be the guiding principle, that 'there must at all times be adequate groundwork before applying the presumption' and not indiscriminately, as in that case.

Now, what is this groundwork? Groundwork means a basis. The basis of any criminal prosecution, of course, is investigation, which results in evidence being produced to the Court, evidence of a particular fact or facts from which an inference of guilt or innocence can be drawn. The truth about section 144 is that the practical necessities of a trial have elevated a presumption of fact to the status of a presumption of law. Intrinsically the presumption remains an inference from facts. Such being the case the circumstances under which passengers come to be carried on a vehicle becomes a vital subject of inquiry before any prosecution. By groundwork I mean nothing more and nothing less than such investigation resulting in relevant evidence consistent with, not in rebuttal of, the presumption."

Cases referred to:—

(1) *Public Prosecutor* v. *Mohamed Yunus* noted [1963] M.L.J. 10.

(2) *Gan Chye Huat* v. *Public Prosecutor* [1962] M.L.J. 27.

(3) *Public Prosecutor* v. *Ong Hock Tuan* [1963] M.L.J. 10, 11.

CRIMINAL APPEAL.

B. G. Yeap (Miss) for the appellant.

Mohamed bin Ya'acob (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Ong J.: This is an appeal against the decision of the Magistrate at Bruas convicting the appellant on three charges, namely, under section 92(1) of the Road Traffic Ordinance, 1958, for using his private motor-car SF. 5202 as a public service vehicle, under section 22(2) for using the said motor-car for a purpose for which the licence fee chargeable was higher than the fee for the licence held, and under section 74(1) for using the said motor-car without there being in force in relation to such user such a policy of insurance in respect of third party risks as complies with the requirements of Part IV of the Ordinance. The appellant was sentenced to pay a fine of $150 on the first charge, $100 on the second charge and $100 on the third charge. The learned Magistrate also made an order disqualifying the appellant from holding a driving licence for 12 months and confiscating the car.

The grounds of appeal were (i) that the verdict was unreasonable having regard to the evidence, (ii) that at the close of the prosecution there was no case to answer, (iii) that the Magistrate misdirected himself in holding that